

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MARVEL CHARACTERS, INC.,

Plaintiff and Counterclaim-Defendant,

v.

LAWRENCE D. LIEBER,

Defendant and Counterclaimant.

MARVEL CHARACTERS, INC.,

Plaintiff and Counterclaim-Defendant,

v.

KEITH A. DETTWILER, in his capacity as Executor of the Estate of Donald L. Heck,

Defendant and Counterclaimant.

MARVEL CHARACTERS, INC.,

Plaintiff and Counterclaim-Defendant,

v.

PATRICK S. DITKO, in his capacity as Administrator of the Estate of Stephen J. Ditko,

Defendant and Counterclaimant.

Case No.: 1:21-cv-7955-LAK
and consolidated cases
21-cv-7957-LAK and 21-cv-7959-LAK

Hon. Lewis A. Kaplan

LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT AND COUNTERCLAIMANT PATRICK S. DITKO

Oral Argument Requested

Pursuant to Local Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York, Defendant and Counterclaimant Patrick S. Ditko, as Administrator of the Estate of Stephen J. Ditko (“Counterclaimant”) respectfully submits the following statement of material facts as to which there is no genuine issue to be tried in support of his motion for summary judgment.

1. **From its beginnings in the Great Depression to the 1960s, the comic book business was a “fly-by-night” operation where publishers quickly came and went.** See May 19, 2023 Declaration of Marc Toberoff (“Toberoff Decl.”), Ex. 1 at 7 (Supplemented Expert Report of Mark Evanier (“Evanier Rep.”), providing historical background and explaining volatile historical context of comic book business from the 1930s to the 1960s); Ex 3 at 204:6-23, 242:16-243:8 (John V. Romita (“Romita”) testifying that Goodman would open and close his comic book business at the drop of a hat and that Romita had no employment security); Ex. 13 ¶ 13 (Neal Adams (“Adams”) attesting that the comic book business was hand-to-mouth and the early years were a confusing time when one was not sure whether any particular comic book would still be around in a year).

2. **In the 1930s-1940s, at some publishers, artists worked as employees, usually at long rows of desks, resembling a “sweatshop.”** See Toberoff Decl., Ex. 1 at 8 (Evanier Rep. describing common custom and practices by which comic books were created in the comic book industry’s early years and explaining that some companies hired staff artists and writers to work on premises and were paid by the hour or week to create stories, usually sitting at long rows of desks resembling a “factory sweatshop”).

3. **In the 1930s-1940s, at some publishers, freelancers submitted completed work and the publisher purchased what it chose to publish.** See Toberoff Decl., Ex. 1 at 8 (Evanier Rep. describing common custom and practices by which comic books were created in the industry’s

early years and explaining that some companies paid freelancers for their work, which was often created at home, and which the publisher could choose to purchase, or not purchase, by the page); Ex. 2 at 71:17-74:5 (Lawrence Lieber (“Lieber”) testifying that he sold freelance work to Marvel in the 1950s-1960s, had no contract with Marvel, and that Marvel was not obligated to buy his submitted material).

4. Comic book publishers saw little value in their disposable product beyond monthly sales figures. *See* Toberoff Decl. Ex. 1 at 7 (Evanier Rep. describing the custom and practice of comic book publishers attributing little value to comic books in the industry’s early years); Ex 3 at 78:21-79:21, 254:2-25 (Romita testifying that no one at Marvel cared about the comic book characters until the 1950s and he never thought the art would be worth anything or that the comic book industry would last); Ex. 20 at 50:21-53:25, 154:13-155:14, 156:11-17 (Mark Evanier (“Evanier”) testifying that Goodman saw little value in the work being done in the 1960s and was just following trends, that Stan Lee (“Lee”) told Evanier that comics would crumble and nothing would be remembered, and that Sol Brodsky (“Brodsky”) told Evanier that, in the 1960s, no one expected the comic books to ever be reprinted).

5. Little to no attention was paid to copyright issues by the publishers or artists. *See* Toberoff Decl., Ex. 1 at 7 (Evanier Rep. describing the custom and practice of comic book publishers attributing little value to comic books in the industry’s early years and the lack of attention paid to copyrights of the material); Ex 3 at 78:21-79:21, 254:2-25 (Romita testifying that no one at Marvel cared about the characters until the 1950s and he never thought the art would be worth anything or that the comic book industry would last).

6. In 1939, Martin Goodman (“Goodman”) founded Marvel’s purported predecessor, Timely Comics (“Timely”). *See* Toberoff Decl., Ex. 1 at 8 (Evanier Rep. providing historical context and describing Goodman’s founding of Timely); Ex. 4 at 11:24-12:3 (Lee

testifying that Timely changed names many times, but eventually became Marvel); Ex. 56 at 82:23-83:13 (Lee testifying he started working at Timely, which was somehow related to Magazine Management, and which eventually became “Marvel”).

7. Since 1947, Goodman’s Timely Comics, which later became Magazine Management Company (“Magazine Management”), published a number of pulp magazines.

See Toberoff Decl. Ex. 1 at 8 (Evanier Rep. providing historical context and explaining that Goodman started out publishing “pulp” magazines, which were cheaply printed periodicals printed on pulp paper); Ex. 56 at 82:23-83:13 (Lee testifying he started working at Timely, which was somehow related to Magazine Management, and which eventually became “Marvel”).

8. In 1951, Goodman began operating his comics business through Magazine Management under the label “Atlas Comics” and later, “Marvel Comics.” *See* Toberoff Decl., Ex. 11 ¶ 4 (Gene Colan (“Colan”) attesting that he was originally hired in 1946 as a staff artist for Timely, which became Atlas, then Marvel); Ex. 17 at 34:21-35:25 (Roy Thomas (“Thomas”) testifying that Goodman kept changing names of his companies and the public was confused as to what the name of “Marvel” actually was. The company started as “Timely,” but that “Atlas,” which was Goodman’s distributing company, had its name on the magazines, which made the public think the company’s name was “Atlas.” Finally, “Marvel” began being used sometime in 1961 to 1963.); Ex. 56 at 82:23-83:13 (Lee testifying he started working at Timely, which was somehow related to Magazine Management, and which eventually became “Marvel”).

9. In addition, from the 1940s until June 1968, Goodman also operated his comic book business through dozens of unrelated shell companies. *See* Toberoff Decl., Ex. 14 at 4 (Rebuttal Expert Report of Mark Evanier (“Evanier Rebuttal Rep.”) providing historical context and explaining that Goodman registered the copyright to comic books under the names of various shell corporations that were unrelated to each other); Ex. 17 at 317:18-318:18 (Thomas testifying

that Goodman ran “Marvel” as a bunch of small companies rather than just as a unified Magazine Management for some unknown business or legal reasons); Ex. 20 at 196:1-12 (Evanier testifying that Brodsky described Goodman’s shell companies as “shell companies”); Ex. 24 at 49:21-50:22 (Paul Levitz (“Levitz”) testifying that Vista Publications, Inc. (“Vista”) was one of Goodman’s shell companies); Ex. 46 at 1-3 (list of Goodman’s shell companies dated October 4, 1967 showing no legal or corporate relationship to one another or Magazine Management).

10. These shell companies had no employees, no actual offices or business activities, and, aside from being the name listed on the comic book cover copyright indicia, had no connection whatsoever to the works they purportedly copyrighted and published. See Toberoff Decl. Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 17 at 244:15-23, 278:20-279:20 (Thomas testifying that the door to “Marvel’s” office in 1965 only said “Magazine Management” and “Marvel’s” employees worked in Magazine Management’s offices); *id.* at 318:4-322:14 (Thomas testifying that Vista, Atlas Magazines, Inc. (“Atlas”), Non-Pareil Publishing Corp. (“Non-Pareil”), and others were just used as names on the comic book cover copyright indicia, but other than the indicia, no one knew what those entities did); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 24 at 51:19-52:2 (Levitz testifying that Goodman’s shell companies had no actual offices and that only Magazine Management had offices); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as

the only entity that paid him for his freelance material from 1962 to 1966 (the “Period”)).

11. **“Marvel” from its inception through the 1960s, was unique in its informality and disorganization.** *See* Toberoff Decl. Ex. 24 at 112:20-113:4 (Levitz testifying that Marvel was disorganized and did not have document retention policies and could not even keep track of its published comic books, which was very different than the more-organized DC Comics); Ex. 8 ¶ 10 (Joe Sinnott (“Sinnott”) attesting that Marvel was very small and disorganized in the 1950s and 1960s); Ex. 65 at 8-9 (Flo Steinberg (“Steinberg”) explaining that, when she was hired at Marvel in March 1963, she and Lee were the only employees and noting that Marvel had the “teeniest little office” and that there “was just a small amount of comics to get out”).

12. **Lee started at Timely as an office boy.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. describing Lee’s role as an office boy at Timely); Ex. 4 at 10:23-11:17 (Lee testifying that he got hired at Timely in 1939 or 1940); Ex. 56 at 82:13-22 (Lee testifying he started at Timely around 1940 when he was 17 years old).

13. **Lee was the nephew of Goodman’s business manager who married into the Goodman family, making Lee, Goodman’s relative.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. describing Lee’s familial connection to Goodman); Ex. 5 at 296:10-14 (Lee testifying he was Goodman’s wife’s cousin).

14. **In 1941, Goodman promoted Lee, then 18, to the role of editor of his fledgling comic book business.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. describing Lee’s promotion from office boy and apprentice writer to editor); Ex. 4 at 14:2-17 (Lee testifying that he got promoted to editor).

15. **By the mid-1940s, Timely had staff artists on salary, but in 1949, Goodman discovered surplus artwork, and fired his entire staff.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. providing historical context giving rise to Marvel’s use of freelance creators and explaining

that Goodman's discovery of surplus, unpublished artwork in 1949 caused him to fire the staff artists); Ex. 5 at 368:11-369:14, 371:3-25 (Lee testifying that Goodman discovered excess artwork and had Lee fire almost everyone and that artists went from having guarantees from Goodman for a certain amount of work, to working freelance where Marvel "would only buy what [it] needed"); Ex. 11 ¶ 4 (Colan attesting that he was originally hired in 1946 as a staff artist for Timely, but was let go in the late 1940s, at which point he "sold artwork on a freelance basis to Timely").

16. In 1954-57, Senate hearings on the corrupting influence of comics nearly bankrupted Timely, now Magazine Management. *See* Toberoff Decl. Ex 3 at 200:4-202:4 (Romita testifying that, around 1957, Timely/Atlas was having financial troubles because of Congressional hearings so the company cut artists and cut the number of comic book issues it was publishing); Ex. 24 at 138:16-140:7 (Levitz testifying that the comic book industry underwent great unrest in the 1950s).

17. In 1957, Magazine Management again fired essentially all its employees except Lee. *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. providing historical context giving rise to Marvel's relationship with freelancers and describing Goodman's decision to fire all writers and artists except Lee); Ex 3 at 123:18-125:12 (Romita testifying that he was fired around 1957 and was not paid for the work he was in the middle of completing); Ex. 5 at 372:19-373:13 (Lee testifying that Goodman had Lee fire everyone a second time in response to the Senate comic book controversy); Ex. 8 ¶ 10 (Sinnott attesting that Marvel fired its staff in 1957).

18. Magazine Management went from publishing 45 comics per month to 8. *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. providing historical context and describing Magazine Management's severe reduction in the number of books it published during the 1950s); Ex 3 at 123:18-125:12, 200:4-202:4 (Romita testifying that, around 1957, Timely/Atlas was having financial troubles so the company cut artists and cut the number of titles it published); Ex. 17 at

110:11-23 (Thomas testifying that Marvel was publishing only 8 comics per month in the 1960s); Ex. 65 at 8-9 (Flo Steinberg explaining that, when she was hired at Marvel in March 1963, she and Lee were the only employees and noting that Marvel had the “teeniest little office” and that there “was just a small amount of comics to get out”).

19. **In 1958, to keep its operations afloat, Magazine Management resumed buying freelance material at a per-page rate, but purposefully had no written contracts with freelancers, including Steve Ditko (“Ditko”). See Toberoff Decl. Ex. 1 at 10, 13 (Evanier Rep. providing historical context giving rise to Marvel’s use of freelance creators and explaining that, when Magazine Management ran out of surplus artwork to publish, it began to purchase artwork and scripts from freelancers at a low page rate and that freelancers did not have written contracts with Magazine Management during the 1950s or 1960s); Ex. 14 at 10-11 (Evanier Rebuttal Rep. explaining that it was not the custom and practice of Marvel or other publishers in the comic book industry to have written contracts with freelance creators during the Period); Ex. 2 at 71:17-74:5 (Lieber testifying that he sold freelance work to Marvel in the 1950s and 1960s, had no contract with Marvel, and that Marvel was not obligated to buy his submitted freelance material); Ex. 3 at 159:24-160:4, 194:11-195:3, 211:7-212:3 (Romita testifying that he did not have a contract with Marvel as a freelancer); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 6 at 36:17-21, 202:2-20 (Thomas testifying that he had no contract with Marvel until 1974); Ex. 8 ¶ 10 (Sinnott attesting that he had no contract with Marvel and Marvel was very small and disorganized in the 1950s and 1960s); Ex. 8 ¶ 11 (Sinnott attesting that Marvel had no obligation to buy pages of his work and that Marvel paid only for the pages it wanted); Ex. 9 ¶ 8 (James Steranko (“Steranko”) attesting that he did not have a contract with Marvel when he was submitting freelance material to it from 1966 to 1973); Ex. 10 ¶ 12 (Richard Ayers (“Ayers”) attesting that he had no contract with Marvel from 1959 to 1975); Ex. 11 ¶ 9 (Colan attesting that**

he had no contract with Marvel until 1975); Ex. 13 ¶ 7 (Adams attesting that he had no contract with Marvel in the 1960s or 1970s); Ex. 17 at 39:25-40:4, 51:20-52:4 (Thomas testifying that he had no written contract from 1965 to 1974); Ex. 22 at 287:22-288:12 (Lieber testifying that he had no contract with Marvel in the 1950s or 1960s); Ex. 24 at 79:2-8 (Levitz testifying that Marvel did not have contracts with any freelancer until the mid-1970s).

20. While it was understood that “Marvel” owned the work created by freelance writers/artists once it purchased and paid for such work, neither Magazine Management (nor Goodman’s shell companies) nor the freelancers viewed their creations as “work made for hire” or “Marvel” as the “author.” See Toberoff Decl. Ex. 8 ¶¶ 14-15 (Sinnott attesting that in the 1950s and 1960s, he did not consider his freelance work submitted to Marvel to be done as “work made for hire”); Ex. 9 ¶ 8 (Steranko attesting that no one at Marvel ever informed him that his work was being created as “work made for hire” from 1966 to 1973); Ex. 10 ¶ 13 (Ayers attesting that he thought Marvel owned his work because it bought the material he submitted, but that he never heard the term “work for hire” and did not think his work was created as “work made for hire”); Ex. 11 ¶ 12 (Colan attesting that he believed Marvel owned the work it purchased from him, but that he never heard the term “work for hire”); Ex. 13 ¶¶ 12-13 (Adams attesting that he did not consider the work he submitted to Marvel to be done as “work made for hire”); Ex. 21 at 97:3-23 (Steranko testifying that he believed that when he walked into Marvel to deliver his freelance material, he still owned the work and that his work belonged to him until he cashed the check Marvel wrote to him); Ex. 22 at 266:13-267:2 (Lieber testifying that he believed he owned his freelance material until Marvel bought it from him); Ex. 54 at 2021MARVEL-0070259 (Marvel President James Galton (“Galton”) correspondence to Thomas dated February 24, 1978 stating “it was our intent that all copyrights be assigned to Marvel, I assume this is acceptable to you … I would appreciate your signing … to confirm that all right to claim renewal and extension of

copyrights are assigned to Marvel"); Ex. 64 at 245 n.80 (Nimmer explaining in 1963 "that 17 U.S.C. Sec. 26 expressly renders an employer for hire an 'author' but makes no comparable provision with respect to commissioned works").

21. **In June 1968, Goodman sold Magazine Management and all his shell companies to publicly traded Perfect Film and Chemical Corporation ("Perfect Film") which was later renamed Cadence Industries ("Cadence"). See Toberoff Decl. Ex. 1 at 17 (Evanier Rep. providing historical context of Marvel's sale to Perfect Film in 1968, which was later renamed Cadence in 1973); Ex. 7 at 273:19-274:3 (Thomas testifying that Marvel was taken over by Perfect Film/Cadence); Ex. 17 at 246:1-12 (Thomas testifying that Perfect Film bought Marvel and later changed its name to "Cadence"); Ex. 24 at 37:5-18, 52:8-13 (Levitz testifying Marvel was a privately held company until it was sold to Perfect Film, which was a public company); Ex. 46 at 1-3 (list of Goodman's shell companies drafted in preparation of the sale to Perfect Film, dated October 4, 1967).**

22. **When it took over, Cadence sought to shore up Magazine Management's assets. See Toberoff Decl. Ex. 1 at 17 (Evanier Rep. describing historical context concerning Cadence's difficult task of trying to solidify Marvel's intellectual property assets after it purchased Marvel in the 1960s because of Marvel's haphazard business practices in the 1950s and 1960s); Ex. 3 at 226:8-227:3 (Romita testifying that, when Cadence purchased Marvel, it came in and tried to nail down all the freelancers and rights to the works); Ex. 48 at (Certificate of Registration of a Claim for Copyright dated August 31, 1964 for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Magazine Management and identifying Lee as the "Author" and Non-Pareil as the "Copyright Claimant." Compared to the Certificate of Renewal Registration for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Cadence's purported successor, Marvel Entertainment Group, dated December 15, 1992 and now claiming Lee as an "Employee for Hire of Non-Pareil").**

23. **Marvel did not ask any freelance creator to sign any contract until 1974.** See Toberoff Decl. Ex. 2 at 71:17-74:5 (Lieber testifying that he sold freelance work to Marvel in the 1950s and 1960s and had no contract with Marvel); Ex. 11 ¶ 9 (Colan attesting that he had no contract with Marvel until 1975); Ex. 9 ¶ 8 (Steranko attesting that he did not have a contract with Marvel while he was submitting freelance material to the company from 1966 to 1973); Ex. 17 at 39:25-40:4, 51:20-52:4 (Thomas testifying that he had no written contract from 1965 to 1974); *id.* at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas's in 1974, which was the first); Ex. 24 at 79:2-8 (Levitz testifying that Marvel did not have contracts with any freelancer until the mid-1970s); Ex. 43 ¶ 7 (Marvel's contract with Colan dated March 22, 1975); Ex. 44 ¶ 7 (Marvel's contract with Roy Thomas dated September 1, 1974).

24. **These contracts contained assignment language only and no contract during this time used the term “work for hire” or identified Magazine Management/Cadence as the “author” of any of the works created by the freelancers who sold work to them, even though it was the norm for publishers at the time to do so.** See Toberoff Decl. Ex. 14 at 16-17 (Evanier Rebuttal Rep. explaining that it was the custom and practice of publishers seeking to be considered legal “authors” of “works-made-for-hire” to state so clearly and in writing during the Period); Ex. 8 ¶¶ 14-15 (Sinnott attesting that no Marvel contract used the term “work for hire” until 1978 or 1979, and that no one at Marvel used that term in the 1960s); Ex. 9 ¶ 8 (Steranko attesting that no one at Marvel used the term “work made for hire” from 1966 to 1973); Ex. 11 ¶ 13 (Colan attesting that his 1975 contract with Marvel used assignment, not work-for-hire, language); Ex. 17 at 60:3-10 (Thomas testifying that his 1974 contract continued the previous pre-contract working arrangement); Ex. 43 ¶ 7 (Marvel's contract with Colan dated March 22, 1975 using language of assignment, not work-for-hire); Ex. 44 ¶ 7 (Marvel's contract with Thomas dated September 1, 1974 using language of assignment, not work-for-hire); Ex. 53 ¶ 7 (Marvel's contract with Thomas

dated August 27, 1976 still using language of assignment, not work-for-hire); Ex. 52 ¶ 7 (Marvel’s October 7, 1977 contract with Stephen Gerber (“Gerber”) using language of assignment, not work-for-hire); *compare* Ex. 47 ¶ 6 (unsigned Lancer Books contract with Don Rico dated December 15, 1966 with provision stating Lancer “shall be deemed the Author of the Work … in view of the fact that [Rico was Lancer’s] employee for hire”); Ex. 54 at 2021MARVEL-0070259 (Marvel President Galton correspondence to Thomas dated February 24, 1978 stating “it was our intent that all copyrights be assigned to Marvel, I assume this is acceptable to you … I would appreciate your signing … to confirm that all right to claim renewal and extension of copyrights are assigned to Marvel”).

25. The “work for hire” doctrine became the focus of attention when the 1976 Copyright Act established an explicit “work for hire” regime under which work by an independent contractor could be “made for hire,” under certain conditions. *See* Toberoff Decl. Ex. 15 at 25 (Expert Report of Paul Levitz (“Levitz Rep.”) explaining that, once the 1976 Copyright Act was enacted, it was then that publishers began using the term “work made for hire”); Ex. 20 at 160:8-162:14 (Evanier testifying that Cadence attempted to fit pre-1978 works into the work-for-hire provision of the 1976 Copyright Act); Ex. 24 at 106:16-107:21 (Levitz testifying that people in the comic book industry began to talk about “work for hire” in the mid-1970s, as the Copyright Act of 1976 was coming into existence).

26. Commencing in the late 1970s, Marvel/Cadence attempted to re-label the freelance material Marvel’s predecessors had purchased and published decades earlier as “work for hire,” even though such purchased material had theretofore not been treated or viewed as such by Marvel or the freelancers. *See* Toberoff Decl. Ex. 1 at 17 (Evanier Rep. explaining Cadence’s practices of trying to fit prior freelance work purchased by Marvel into the “work-for-hire” provisions of the Copyright Act of 1976); Ex. 5 at 371:3-25 (Lee testifying that

Marvel “would only buy what [it] needed”); Ex. 15 at 25 (Levitz Rep. explaining that, once the 1976 Copyright Act was enacted, it was only then that publishers began using the term “work made for hire”); Ex. 13 ¶ 15 (Adams attesting that Marvel started forcing freelancers to sign retroactive “work for hire” releases and other contracts in the late 1970s); Ex. 20 at 160:8-162:14 (Evanier testifying that Cadence tried to fit pre-1978 works into the work-for-hire provision of the 1976 Copyright Act); Ex. 39 (purported retroactive work-for-hire contract dated January 26, 1979 allegedly signed by Ditko); Ex. 48 at (Certificate of Registration of a Claim for Copyright dated August 31, 1964 for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Magazine Management and identifying Lee as the “Author” and Non-Pareil as the “Copyright Claimant.” Compared to the Certificate of Renewal Registration for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Cadence’s purported successor, Marvel Entertainment Group, dated December 15, 1992 and now claiming Lee as an “Employee for Hire of Non-Pareil”); Ex. 64 at 245 n.80 (Nimmer explaining in 1963 “that 17 U.S.C. Sec. 26 expressly renders an employer for hire an ‘author’ but makes no comparable provision with respect to commissioned works”).

27. In the 1970s, Marvel began insisting that freelancers sign contracts or acknowledgements that retroactively re-characterized as “work for hire,” decades after creation, all of the freelance material Marvel’s predecessors had purchased. See Toberoff Decl. Ex. 11 ¶ 14 (Colan attesting that in 1978, he was forced to sign a contract stating that everything he had ever created and submitted to Marvel was done as “work made for hire”); Ex. 13 ¶ 15 (Adams attesting that Marvel started forcing freelancers to sign retroactive “work for hire” releases and other contracts in the late 1970s); Ex. 15 at 25 (Levitz Rep. explaining that, starting in 1977 or 1978, Marvel began to have freelancers sign “work made for hire” releases stating that all prior work had been submitted on a “work made for hire” basis); Ex. 20 at 160:8-162:14 (Evanier testifying that Cadence tried to fit pre-1978 works into the work-for-hire provision of the 1976

Copyright Act); Ex. 39 (retroactive work-for-hire contract dated January 26, 1979 allegedly signed by Ditko); Ex. 64 at 245 n.80 (Nimmer explaining in 1963 “that 17 U.S.C. Sec. 26 expressly renders an employer for hire an ‘author’ but makes no comparable provision with respect to commissioned works”).

28. **In the late 1970s and 1980s, after Marvel’s competitor, DC Comics, began returning to freelancers their physical art (as opposed to the copyrights therein) so the freelancers could improve their uncertain and unstable financial situations by selling autographed art to fans, Marvel was under pressure to do the same.** See Toberoff Decl. Ex. 1 at 23 (Evanier Rep. describing DC Comics and other publishers’ practice of returning artwork to the freelancers who created it); Ex. 6 at 82:2-12 (Thomas testifying that Marvel returned artwork to give artists extra income and to enhance goodwill); Ex. 9 ¶¶ 15-16 (Steranko attesting that Marvel began to return artwork to freelancers to avoid paying sales taxes on its purchase of such material and that freelancers welcomed the extra source of income); Ex. 10 ¶ 15 (Ayers attesting that he signed artwork releases because he needed the extra income).

29. **Marvel withheld the art and conditioned its return on the freelancers signing purported retroactive releases and acknowledgements that the freelance art they had created decades earlier was all “work made for hire.”** See Toberoff Decl. Ex. 1 at 24 (Evanier Rep. describing Marvel’s practice of returning artwork to the freelancers who created it on condition that freelancers sign “work-for-hire” releases); Ex. 9 ¶ 16 (Steranko attesting that Marvel returned artwork, but made freelancers sign releases recharacterizing their work as “work made for hire”); Ex. 13 ¶ 15 (Adams attesting that Marvel started forcing freelancers to sign retroactive “work for hire” releases and other contracts in the late 1970s); Ex. 20 at 160:8-162:14 (Evanier testifying that Cadence tried to fit pre-1978 works into the work-for-hire provision of the 1976 Copyright Act); Ex. 37 at 2021MARVEL-0054634-005636 (sample 1979-1980 artwork releases retroactively

claiming the returned artwork was done by Marv Wolfman as an “employee-for-hire”).

30. **In the early 1980s, Marvel ran a competition for aspiring artists and writers, open to the public.** See Toberoff Decl. Ex. 1 at 17 (Evanier Rep. describing Marvel’s practice of running competitions to discover new, aspiring artist and writers); Ex. 34 at 1 (Randy Schueller (“Schueller”) interview explaining that Marvel ran a competition for aspiring writers and artists in the early 1980s).

31. **One entrant, Randy Schueller, an amateur and previously unknown writer/artist, submitted a story wherein Spider-Man had a stealthy black costume instead of his usual red, black, and blue.** See Toberoff Decl. Ex. 1 at 17 (Evanier Rep. describing Schueller’s unique Spider-Man submission and his amateur status); Ex. 31 at 2 (Walter Durajlija (“Durajlija”) writing that young fan Schueller won an ideas contest Marvel was having in 1982 with his idea for a black Spider-Man costume); Ex. 34 at 2 (Schueller interview explaining that he came up with, and submitted to Marvel, a story featuring a black-costume Spider-Man).

32. **A few months after Schueller’s submission, then Marvel editor, Jim Shooter (“Shooter”), wrote to Schueller on August 3, 1982, offering to buy the story for \$220 and told him to sign a “Work-made-for-hire Agreement.”** See Toberoff Decl. Ex. 17 at 59:2-10 (Thomas testifying that Jim Shooter was editor-in-chief at Marvel in the 1980s); Ex. 31 at 2 (Durajlija writing that Marvel editor Shooter liked the costume idea and bought it from Schueller for \$220); Ex. 32 (Shooter letter dated August 3, 1982 offering to buy Schueller’s black-costume *Spider-Man* story submission for \$220 and telling Schueller to sign the attached “Work-made-for-hire Agreement”); Ex. 34 at 2 (Schueller interview explaining that, a few months after he submitted his black-costume *Spider-Man* story, Shooter wrote to him offering to buy it for \$220); Ex. 38 (retroactive work-for-hire agreement signed by Schueller dated August 9, 1982).

33. **Schueller signed the agreement on August 9, 1982, which is the same form**

agreement Marvel had other freelancers sign in and around 1978. See Toberoff Decl. Ex. 1 at 17 (Evanier Rep. identifying Schueller's August 9, 1982 contract as being the same as those Marvel forced freelancers to sign in the late 1970s); Ex. 38 (retroactive work-for-hire agreement signed by Schueller dated August 9, 1982); Ex. 39 (retroactive work-for-hire contract dated January 26, 1979 allegedly signed by Ditko).

34. **Schueller's "agreement" retroactively provided that "all work ... which have been or are in the future created ... [were] to be considered a work made for hire."** See Toberoff Decl. Ex. 38 (purported retroactive work-for-hire agreement signed by Schueller dated August 9, 1982).

35. **Ditko was a prolific comic book creator and illustrator who revolutionized the artform, and created or co-created, in the Period, some of Marvel's most enduring and profitable superheroes including, without limitation, Spider-Man and Dr. Strange (the "Works").** See Toberoff Decl. Ex. 17 at 17:8-23 (Thomas testifying that Ditko and others revolutionized comics with their characters and style); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange "'twas Steve[] [Ditko's] idea," in a letter dated January 9, 1963); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the story plotting of *Spider-Man*).

36. **Unlike most freelancers in the Period who worked from home, Ditko worked out of a separate art studio he rented at his own expense.** See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. explaining the custom and practice of freelancers creating their material from home and noting that Ditko was unique in renting and paying for a separate studio); Ex. 2 at 76:4-24 (Lieber testifying that he created his freelance work from home and used his own supplies); Ex. 3 at 16:22-24, 194:14-195:3, 209:16-210:7 (Romita testifying that he purchased his own materials and

worked from home); Ex. 4 at 33:25-34:2 (Lee testifying that freelancers mostly worked from home); Ex. 6 at 30:21-24 (Thomas testifying that he did his freelance writing from home); Ex. 8 ¶ 9 (Sinnott attesting that he worked from home and paid for his own materials); Ex. 9 ¶ 10 (Steranko attesting that he worked from home and paid for his own materials, for which Marvel never reimbursed him); Ex. 10 ¶ 10 (Ayers attesting that he worked from home and paid for his own materials); Ex. 11 ¶ 8 (Colan attesting that he created his freelance art from home and paid for his own materials); Ex. 13 ¶ 7 (Adams attesting that he worked from home and paid for his own materials); Ex. 16 at 117:15-16 (Nanci Solo (“Solo”) testifying that Colan worked from home); Ex. 17 at 24:5-25:4 (Thomas testifying that artists worked from home as freelancers and rarely, if ever, came into the office); Ex. 22 at 286:17-287:19 (Lieber testifying that he worked from home and paid for his own typewriter); Ex. 24 at 123:18-21 (Levitz testifying that Ditko created work from his own studio).

37. Ditko also paid for all his own materials and instruments, including paper, pens, pencils, erasers, brushes and ink. See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. explaining that it was the custom and practice in the comic book industry, and at Marvel, in the 1960s for freelancers to pay for their own materials including paper, pencils, ink, pens, brushes); Ex. 2 at 76:4-24 (Lieber testifying that he created his freelance work from home and used his own supplies); Ex. 3 at 16:22-24, 194:14-195:3, 209:16-210:7 (Romita testifying that he purchased his own materials and worked from home); Ex. 8 ¶ 9 (Sinnott attesting that he worked from home and paid for his own materials); Ex. 9 ¶ 10 (Steranko attesting that he worked from home and paid for his own materials, for which Marvel never reimbursed him); Ex. 10 ¶ 10 (Ayers attesting that he worked from home and paid for his own materials); Ex. 11 ¶ 8 (Colan attesting that he created his freelance art from home and paid for his own materials); Ex. 13 ¶ 7 (Adams attesting that he worked from home and paid for his own materials); Ex. 17 at 294:6-295:3 (Thomas testifying that

freelancers paid for their own materials, paper, typewriter, and work from home); Ex. 21 at 97:3-23 (Steranko testifying that he paid for his own materials); Ex. 22 at 286:17-287:19 (Lieber testifying that he worked from home and paid for his own typewriter).

38. **Ditko created his freelance artwork solely as an independent contractor on his own time, and at his own volition with the intention and hope of selling his material to Magazine Management, Charlton Comics, or other publishers.** See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. explaining that it was the custom and practice in the comic book industry, and at Marvel, in the 1960s for freelancers to create their material as independent contractors and to set their own hours and choose their own working conditions); Ex. 12 ¶ 18 (Evanier attesting that Ditko was submitting freelance *Spider-Man* material to Marvel but was also selling work to Charlton Comics at the same time); Ex. 23 at 160:2-8 (Mark Ditko testifying that his uncle Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics).

39. **None of Ditko's expenses in creating the Works were paid for or reimbursed, whether by Magazine Management, or by the shell companies that copyrighted the Works.** See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. explaining that it was the custom and practice in the comic book industry, and at Marvel, in the 1960s for freelancers to pay for their own materials including paper, pencils, ink, pens, brushes); Ex. 2 at 76:4-24 (Lieber testifying that he created his freelance work from home and used his own supplies); Ex. 3 at 16:22-24, 194:14-195:3, 209:16-210:7 (Romita testifying that he purchased his own materials and worked from home); Ex. 8 ¶ 9 (Sinnott attesting that he worked from home and paid for his own material); Ex. 9 ¶ 10 (Steranko attesting that he worked from home and paid for his own materials, for which Marvel never reimbursed); Ex. 10 ¶ 10 (Ayers attesting that he worked from home and paid for his own

materials); Ex. 11 ¶ 8 (Colan attesting that he created his freelance art from home and paid for his own materials); Ex. 13 ¶ 7 (Adams attesting that he worked from home and paid for his own materials); Ex. 17 at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know “of [them] having any existence” whatsoever); Ex. 21 at 97:3-23 (Steranko testifying that he worked out of his own studio and paid for his own materials); Ex. 22 at 286:17-287:19 (Lieber testifying that he worked from home and paid for his own typewriter); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the entity that paid him for his freelance pages in the Period).

40. Ditko kept a large chart in his studio, mapping out the future development of his characters so he could plant narrative seeds and introduce elements in current comic book issues whose importance would be revealed and come to fruition much later in issues many months down the line. See Toberoff Decl. Ex. 1 at 12 (Evanier Rep. describing Ditko’s regular practice of maintaining a chart mapping out the future development of a character so he could introduce elements into current issues and then use those elements in issues many months down the line); Ex. 35 at DITKO-0193 (Ditko writing that he planted seeds of subplots in stories that would work their way through the issues until it was time for those sub-stories to play an active role later when the time was right); Ex. 58 at 3 (Ditko writing when he took over the *Spider-Man* stories he “knew in advance the [*Spider-Man*] story line like the best (worst) time for Aunt May to have a heart attack”).

41. When submitting his artwork to Lee, Ditko would often write extensive margin notes, including suggested captions and dialogue, so that when Lee, or later, Thomas, dialogued Ditko’s story, they would know what story points Ditko intended in each panel and what the characters would likely say consistent with the story Ditko had plotted. See Toberoff

Decl. Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko's practice of submitting detailed notes with his freelance material to assist Lee in dialoguing the stories); Ex. 7 at 223:18-225:20 (Thomas testifying that Ditko refused to speak to Lee while working on *Spider-Man* and *Dr. Strange* so all plotting on the stories was done by Ditko, and further, that Ditko would provide margin notes to indicate what he intended to happen in the story to guide Lee when Lee dialogued the story); *id.* at 262:4-264:19 (Thomas testifying that when he began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 18 (1965 example of Ditko's *Dr. Strange* margin notes for Thomas); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script).

42. Ditko, in essence, acted as both a co-writer/plotter and the artist of the Works. Lee, or later sometimes, staff writer Thomas, would then dialogue the balloons and add some captions based on Ditko's illustrated story, notes, and suggestions. See Toberoff Decl. Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); *id.* at 262:4-264:19 (Thomas testifying that, when Thomas began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko,

on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the Marvel Method, and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); *id.* at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 18 (1965 example of Ditko's *Dr. Strange* margin notes for Thomas); Ex. 19 at 6-8 (Thomas interview explaining that Ditko and Lee were not speaking in 1965 and Ditko was plotting both *Spider-Man* and *Dr. Strange* and would only come to the office to drop work off with Brodsky); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 28 (Lee writing that Ditko was the co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and some captions).

43. In the Period, Ditko was paid neither a fixed wage nor for his services, but was paid only for that work Magazine Management chose to purchase subsequent to its creation. See Toberoff Decl. Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of purchasing freelance work by the page, and not paying freelancers fixed wages or for their services or time); Ex. 14 at 3 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers in the Period, including at Marvel, to pay for only those pages they chose to accept and purchase, and to not pay for a freelancer's time or services); Ex. 5 at 371:3-25 (Lee testifying that Marvel "would only buy what [it] needed"); Ex. 8 ¶ 11 (Sinnott attesting that Marvel only paid him for the pages it accepted); Ex. 9 ¶ 14 (Steranko attesting that he was only paid for the pages Marvel accepted); Ex. 10 ¶ 11 (Ayers attesting that he was paid per

page for freelance material which Marvel accepted); Ex. 13 ¶¶ 9-11 (Adams attesting that Marvel only paid him for pages which it accepted); Ex. 17 at 292:24-293:15 (Thomas testifying that freelancers were only paid for the final, accepted page); Ex. 43 ¶ 3(a) (Marvel's contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel's contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel's October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber "will make all changes and rework all Material ... without charge").

44. If work was rejected, Ditko was not compensated, and personally took the loss. See Toberoff Decl. Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of not paying freelancers for material they rejected); Ex. 14 at 3, 7 (Evanier Rebuttal Rep. explaining the custom and practice in the comic book industry in the Period, including at Marvel, to not pay for any freelance material rejected by the publishers); Ex. 2 at 100:3-101:9 (Lieber testifying about a time he witnessed Kirby's work being rejected and Kirby tearing up and throwing away the rejected pages); Ex. 10 ¶ 11 (Ayers attesting that was not paid for rejected material or for having to redo material); Ex. 11 ¶ 9 (Colan attesting that Marvel only paid for the pages it accepted); Ex. 13 ¶¶ 8, 10-11 (Adams attesting that he bore the risk of creation because there was no guarantee his work would be purchased by Marvel); Ex. 15 at 22-23 (Levitz Rep. explaining that it was the custom and practice for comic book publishers to have the right to reject work submitted by freelancers and to pay only for the pages which were accepted); Ex. 16 at 117:6-121:4 (Solo testifying that Colan was not paid for rejected work and that her father was so

upset by this periodic waste of his efforts that he would commonly use the rejected, unpaid-for pages of artwork to pick up their family dog's feces); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel could accept or reject submitted freelance material in its sole discretion); Ex. 20 at 73:14-74:24 (Evanier testifying that Marvel had asked Evanier to submit some work in the 1970s prior to 1978, for a new magazine, but that after he did the work, Marvel declined to buy it or pay for it since it decided not to publish the magazine after all); Ex. 21 at 29:9-30:17 (Steranko testifying that Lee sometimes rejected the work Steranko submitted on spec); Ex. 22 at 155:17-156:4, 259:5-16, 267:5-269:21 (Lieber testifying that he was only paid for work that was accepted by Marvel and recalls at least one instance where he submitted a plot which Marvel rejected and did not pay for); Ex. 24 at 14:12-19, 104:16-105:11 (Levitz testifying that Marvel had the right to reject material and not pay for it); Ex. 43 ¶ 3(a) (Marvel's contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel's contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel's October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber "will make all changes and rework all Material ... without charge").

45. If Ditko was asked to redraw a page, he was not compensated for the extra time, materials, or labor necessary to make such changes, but was paid only for the final, completed page Magazine Management decided to buy. See Toberoff Decl. Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of not paying freelancers to revise or redraw a page, as freelancers were only paid for the final pages the

publisher decided to accept and purchase); Ex. 14 at 7 (Evanier Rebuttal Rep. explaining the custom and practice in the comic book industry, including at Marvel, for publishers to not pay for rejected material, or to pay a freelancer to make revisions to his material); Ex. 2 at 102:15-105:17 (Lieber testifying he was not paid for redoing work and that he was only paid for the final pages Marvel accepted); Ex. 8 ¶ 13 (Sinnott attesting that Marvel only paid for the final pages that were sold to Marvel, not for any changes or rejected work); Ex. 9 ¶ 14 (Steranko attesting he was not compensated for having to redo any work); Ex. 10 ¶ 11 (Ayers attesting that he was not paid for rejected material or for having to redo material); Ex. 11 ¶¶ 9, 11 (Colan attesting that Marvel did not pay him for redoing work); Ex. 13 ¶¶ 10-11 (Adams attesting that he was only paid for pages Marvel accepted); Ex. 17 at 142:21-143:15, 296:10-25 (Thomas testifying that freelancers were not paid for having to redo or revise pages and that they would only be paid for the final, accepted page); Ex. 43 ¶ 3(a) (Marvel's contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel's contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel's October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber "will make all changes and rework all Material ... without charge").

46. **Ditko often refused to make changes to his work outright, and in that event, any changes Lee wanted were either ignored, or had to be made by a production assistant after Ditko had sold his work to the company.** See Toberoff Decl. Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko's practice of refusing to make changes and in such case, Marvel's custom of

having staff make such changes after the work had been submitted to and purchased by Marvel); Ex. 3 at 75:18-20, 243:13-244:23, 246:5-9 (Romita testifying that he, or someone else Lee could find in the Marvel office, would be asked to make changes to other artists' work after it had been submitted and would not be paid any extra for making these changes and noting specifically that when Lee did not like something on a Ditko cover, he asked Kirby to change it); Ex. 19 at 6, "Legends at Loggerheads!" (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee's chosen direction); Ex. 21 at 41:7-18 (Steranko testifying that Marvel had production assistants to make changes to work after it had been submitted by artists); Ex. 35 at DITKO-0193 (Ditko writing that he ignored comments from Lee and Brodsky and only made changes to stories when he agreed with them).

47. Magazine Management did not withhold any taxes, nor provide Ditko with any employment benefits. See Toberoff Decl. Ex. 1 at 12 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of publishers not withholding payroll taxes, nor providing health insurance or employment benefits to freelancers in the Period); Ex. 2 at 79:5-80:9 (Lieber testifying that Marvel did not withhold any taxes or pay for any health benefits for freelancers); Ex. 9 ¶ 10 (Steranko attesting that Marvel did not withhold any taxes or provide any employment benefits to him from 1966 to 1973); Ex. 13 ¶ 10 (Adams attesting that Marvel did not withhold any taxes or provide him with any employment benefits).

48. Ditko, as an independent artist, was free to sell, and did sell, work to other publishers, like Charlton Comics, while also selling his work to Magazine Management. See Toberoff Decl. Ex. 1 at 10 (Evanier Rep. describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 3 at 207:12-22 (Romita testifying that freelancers were free to sell work to other publishers); Ex. 9 ¶ 11

(Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 13 ¶¶ 5-6 (Adams attesting that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 17 at 298:8-14, 301:14-303:7 (Thomas testifying that Marvel did not have contracts with freelancers prohibiting them from selling work to other publishers); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics).

49. On the occasions when Ditko and Lee would exchange story ideas, Ditko was free to incorporate ideas from the exchange or reject them altogether. See Toberoff Decl. Ex. 14 at 11, 13 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers to reserve the right to purchase or not purchase freelancers' submitted material, and that freelancers were free to decline to make changes to their work); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee's *Spider-Man* story ideas and characters such as, for instance, Lee's idea for a Spider-Woman character, or Lee's idea of making Aunt May more glamorous); Ex. 58 at 4 (Ditko writing that he "refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it").

50. If Ditko did not wish to work on a project offered to him by "Marvel," he was free to decline it without consequence. See Toberoff Decl. Ex. 14 at 11, 13 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers to reserve the right to purchase or not purchase freelancers' submitted material and for freelancers to be free to sell work to comic book publishers if they so chose); Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee's offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given "assignments," but rather, he had the option to work on some books or to not if he chose not to); Ex. 24 at 89:2-11 (Levitz testifying that

freelancers were free to decline “assignments”); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he “left [them] blank for someone else to fill in”); *id.* (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”).

51. Ditko, an extremely independent-minded artist, supervised himself, edited his own work, and created the Works after little or no discussion with Lee. See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing the common practice of independent freelancers supervising themselves and editing their own work prior to submission); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko plotted and drew *Spider-Man* stories completely on his own for more than one year before he left in 1966); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script).

52. In 1964, Ditko and Lee had a falling out over the future direction of the *Spider-Man* stories and they refused to speak anymore. See Toberoff Decl. Ex. 7 at 223:18-224:13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking); Ex. 17 at 311:2-17 (Thomas testifying that, by the time he

started at Marvel in mid-1965, Ditko and Lee were not speaking anymore because they had been fighting over the direction of the *Spider-Man* series); Ex. 24 at 124:5-24 (Levitz testifying that Ditko and Lee stopped speaking in the last year of Ditko's time with Marvel because Ditko was not getting proper credit for his contributions to the stories); Ex. 35 at DITKO-0193 (Ditko writing that he and Lee stopped speaking around 1964); Ex. 58 at 3 (Ditko writing that he took over all plotting of the *Spider-Man* stories).

53. From that point until Ditko left Marvel in 1966, Ditko was in complete creative control over how he plotted and drew his stories, leaving Lee (and Magazine Management) with little or no control over the stories, aside from Lee's dialoguing the balloons. See Toberoff Decl. Ex. 7 at 223:18-224:13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking); Ex. 17 at 29:19-30:8, 83:13-18 (Thomas testifying that by the time Thomas began at Marvel in mid-1965, Ditko was plotting and penciling *Dr. Strange* stories, which Thomas would dialogue); *id.* at 92:9-20 (Thomas testifying that Ditko stopped working with Marvel around Christmas 1965); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and soon he was doing all the stories, writing, and art for it); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue to the balloons); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 35 at DITKO-0189 (Ditko writing that he left Marvel in 1966); *id.* at DITKO-0193 (Ditko writing that he and Lee stopped speaking around 1964 and thus from then on, Ditko had complete creative control of the *Spider-Man* and *Dr. Strange* stories, which he was plotting and penciling until he left in 1966).

54. Ditko had no employment or other contract during the Period with Magazine Management or any other alleged Marvel predecessor. See Toberoff Decl. Ex. 17 at 298:8-14

(Thomas testifying that freelancers did not have contracts with Marvel until Thomas's in 1974, which was the first); Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 64 at 245 n.80 (Nimmer explaining in 1963 "that 17 U.S.C. Sec. 26 expressly renders an employer for hire an 'author' but makes no comparable provision with respect to commissioned works").

55. Ditko had no contact or relationship with any one of the shell companies (i.e., Vista, Atlas, Non-Pareil) which purported to copyright the magazines in which the Works appeared. See Toberoff Decl. Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 17 at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that he did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or "of [them] having any existence" whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck's payment records identifying "Magazine Management" as the only entity that paid him for his freelance material in the Period).

56. Ditko received no direction or communication from any of the shell companies (i.e., Vista, Atlas, Non-Pareil) or any employee of theirs, as these entities had none, nor was Ditko ever paid by any of them. See Toberoff Decl. Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 17 at 138:3-139:2 (Thomas testifying that Magazine Management was the only payor of staff/freelancer checks); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas

did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period).

57. When Lee composed the final captions and dialogue he too did so as a freelancer, not as Marvel’s editor, as writing was not part of his editorial function. See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee’s common practice of composing dialogue as a freelancer, not as Marvel’s editor and doing his freelancing from home two of the five workdays per week, for which he was paid on a per-page basis as a freelancer); Ex. 3 at 41:19-42:2 (Romita testifying that Lee would stay home several days per week to write); Ex. 4 at 17:17-25 (Lee testifying that he was paid as a freelancer for his writing and was on salary for his work as an editor); Ex. 17 at 27:2-18, 30:9-13, 31:22-32:7, 276:2-14 (Thomas testifying that he was a staff writer/assistant editor in the 1960s and got a salary for that work, but separately freelanced when writing stories and was paid at a per-page rate on a separate check like other freelancers); Ex. 22 at 255:10-256:6 (Lieber testifying that Lee wrote stories and scripts as a writer, not as an editor, because writing is “not what an Editor does”); Ex. 55 at 62:18-63:18 (Lee testifying that he got paid a salary as editor and separately for his writing); Ex. 56 at 91:20-92:6 (Lee testifying that he got paid a salary as editor and separately as a freelancer pre page for his writing); *id.* at 94:6-95:18 (Lee testifying that there was very little editing of his own freelance written material).

58. Lee did his writing at home and his editor’s salary did not cover his writing, for which was paid by the page on a freelance basis. See Toberoff Decl. Ex. 1 at 13 (Evanier

Rep. describing Lee's common practice of composing dialogue as a freelancer, not as Marvel's editor and doing his freelancing from home two of the five workdays per week, for which he was paid on a per-page basis as a freelancer); Ex. 4 at 17:17-25 (Lee testifying that he was paid as a freelancer for his writing and was on salary for his work as an editor); Ex. 6 at 30:21-31:9 (Thomas testifying that Lee did his freelance writing from home); Ex. 17 at 289:7-291:5 (Thomas testifying that he and Lee each did their writing in a freelance capacity from home in the 1960s and would come to the office only to do their editorial work); Ex. 22 at 256:7-257:12 (Lieber testifying that Lee wrote scripts from home); Ex. 55 at 62:18-63:18 (Lee testifying that he got paid a salary as editor and separately for his writing); Ex. 56 at 91:20-92:6 (Lee testifying that he got paid a salary as editor and separately as a freelancer pre page for his writing).

59. **During the Period, it was Marvel's policy that those employed in editorial or production roles, who also created material as artists or writers, did the latter on a freelance basis, on their own time, usually at home, and were paid only for those pages Marvel chose to buy.** See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee's common practice of composing dialogue as a freelancer, not as Marvel's editor and doing his freelance writing from home two of the five workdays per week, and was paid on a per-page basis as a freelancer); Ex. 17 at 289:7-291:5 (Thomas testifying that he and Lee each did their freelance writing from home in the 1960s and would come to the office only to do their editorial work); *id.* at 27:2-18, 30:9-13, 31:22-32:7, 276:2-14 (Thomas testifying that he was a staff writer/assistant editor in the 1960s and got a salary for that work, but separately freelanced when writing stories and was paid at a per-page rate with a separate check like other freelancers); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation).

60. **Lee went in to Magazine Management's office to serve as editor only two or**

three of the five workdays each week, so he could freelance write at his home. See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee's common practice of composing dialogue as a freelancer, not as Marvel's editor and doing his freelancing from home 2 of the 5 workdays per week, and was paid on a per-page basis as a freelancer); Ex. 3 at 41:19-42:2 (Romita testifying that Lee would stay home several days per week to write); Ex. 17 at 289:7-291:5 (Thomas testifying that he and Lee each freelance wrote from home in the 1960s and would come to the office to do their editorial work); Ex. 22 at 256:7-257:12 (Lieber testifying that Lee would do his writing from home).

61. Magazine Management was the only entity that bought work from freelance writers/artists or employed editors like Lee in the Period. See Toberoff Decl. Ex. 17 at 272:23-275:2 (Thomas testifying that he was paid and employed by Magazine Management/Marvel Comics, and then Perfect Film/Cadence); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or "of [them] having any existence" whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck's payment records identifying "Magazine Management" as the only entity that paid him for his freelance material in the Period).

62. The shell companies (e.g., Vista, Atlas, Non-Pareil) had no legal or corporate affiliation to one another or Magazine Management. See Toberoff Decl. Ex. 46 at 1-3 (list of Goodman's shell companies dated October 4, 1967 showing no legal or corporate relationship to one another or Magazine Management); Ex. 17 at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them,

does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management).

63. These shell companies—which Marvel later claimed in the copyright renewal registrations of its comic books (including the Works) were the “authors” of freelancers’ creative material as “works made for hire”—made no payments to, and had no interaction whatsoever with the freelance writers/artists, including Ditko, who created the original material in question. See Toberoff Decl. Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, actual offices, or business activities, and had no contact with any freelancer); Ex. 6 at 200:2-24 (Thomas testifying that he was hired by Magazine Management in 1965); Ex. 17 at 272:23-275:2 (Thomas testifying that he was paid and employed by Magazine Management/Marvel Comics, and then Perfect Film/Cadence); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 40 at 2021MARVEL-0005845 (Certificate of Renewal Registration of *Amazing Fantasy* Vol. 1, No. 15, the issue in which Spider-Man originally appeared, dated November 20, 1990, claiming “Atlas Magazines, Inc.” as the original author and copyright claimant); Ex. 41 at 2021MARVEL-0005849 (Certificate of Renewal Registration of *Amazing Spider-Man* Vol. 1, No. 1 dated November 20, 1990, claiming “Non-Pareil Publishing Corporation” as the original author and copyright claimant); Ex. 42 (Certificate of Renewal

Registration of *Strange Tales* Vol. 1, No. 110, the issue in which Dr. Strange first appeared, dated December 27, 1991, claiming “Vista Publications, Inc.” as the original author and copyright claimant); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period).

64. Lee was only ever paid by Magazine Management for his editorial services and for his freelance writing. See Toberoff Decl. Ex. 17 at 138:3-139:2 (Thomas testifying that Magazine Management was the only payor of staff salaries and freelancer checks); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period).

65. Ditko was not employed by, did not work for, nor have any contact with any of the shell companies. See Toberoff Decl. Ex. 17 at 272:23-275:2 (Thomas testifying that he was paid and employed by Magazine Management/Marvel Comics, and then Perfect Film/Cadence); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management).

66. **Freelancers in the Period were paid with a Magazine Management check for those freelance pages it chose to purchase in its sole discretion.** See Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel could accept or reject submitted material in its sole discretion); Ex. 22 at 303:15-19 (Lieber testifying he thought the name on the checks was Marvel or Magazine Management); Ex. 43 ¶ 3(a) (Marvel’s contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel’s contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel’s contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel’s October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber “will make all changes and rework all Material … without charge”); Ex. 45 at KIRBY-4142-4154, KIRBY-4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”).

67. **Magazine Management stamped legends on the back of its checks, forcing freelancers to sign under the legend to cash them.** See Toberoff Decl. Ex. 1 at 16 (Evanier Rep.

describing the comic book industry and Marvel's custom and practice of stamping legends on the backs of checks to freelancers in the Period, thereby forcing freelancers to sign the legend to cash the check); Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an assignment legend on the back); Ex. 21 at 63:10-64:17, 91:11-93:19 (Steranko testifying that would cross out the legend on the backs of the Marvel checks because he thought it was bad business to add an after-the-fact condition to payment on work that had been submitted a week or two prior); Ex. 45 at KIRBY-4142-4154, KIRBY-4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975, with assignment legends stamped on the backs of the checks); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber's "assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright").

68. Magazine Management's check legends acknowledged the freelancer's contemporaneous "assignment to it of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright." See Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an assignment legend on the back); Ex. 9 ¶ 13 (Steranko attesting that legends on the backs of Marvel's checks to him used assignment, not work-for-hire, language); Ex. 10 ¶ 14 (Ayers attesting that Marvel's check legends used assignment language); Ex. 11 ¶ 12 (Colan attesting that the legends on the backs of Marvel's checks used assignment, not work-for-hire, language); Ex. 13 ¶ 14 (Adams attesting that Marvel's check legends used assignment language only); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the

1960s, Marvel's check legends did not say "work for hire," but indicated that Steranko "gave them the rights to the work, sold them the rights to the work"); Ex. 22 at 269:24-271:20 (Lieber testifying that the check legends used assignment, not work-for-hire language); Ex. 45 at KIRBY-4142-4154, KIRBY-4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975, expressly acknowledging Ayers' "assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright"); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber's "assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright").

69. **As late as 1975, the legends on "Marvel's" checks contained such "assignment" language and no "work for hire" language whatsoever.** See Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by check stamped with a legend that used assignment-type language); Ex. 9 ¶ 13 (Steranko attesting that legends on the backs of Marvel's checks to him until at least 1973 used assignment, not work-for-hire, language); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the 1960s, Marvel's check legends did not say "work for hire"); Ex. 45 at KIRBY-4142-4154, KIRBY-4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975, acknowledging Ayers' "assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright"); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber's "assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright").

70. **In 1966, Ditko, frustrated with Lee/Magazine Management's failure to credit**

and pay him for his enormous role in the *Spider-Man* and *Dr. Strange* stories, refused to sell any more material to the company. See Toberoff Decl. Ex. 3 at 44:22-46:12 (Romita testifying that Ditko quit *Spider-Man* because he had personal and professional conflicts with Lee); Ex. 20 at 57:13-59:3 (Evanier testifying that Ditko told him he had been promised additional compensation if his characters were used in other media); Ex. 24 at 124:5-24 (Levitz testifying that Ditko and Lee stopped speaking in the last year of Ditko's time with Marvel because Ditko was not getting proper credit for his contributions).

71. **In 1963, Ditko created, plotted, and drew the first story of his celebrated character, the supernatural magician, Dr. Strange, published in *Strange Tales* No. 110.** See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko's Dr. Strange character in *Strange Tales* No. 110); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange ““twas [Ditko’s] idea,” in a contemporaneous letter dated January 9, 1963); Ex. 49 at 1 (first published appearance of Dr. Strange in *Strange Tales* No. 110).

72. **Ditko independently originated the character in 1946 more than a decade before he met Lee and began selling his work to Magazine Management.** See Toberoff Decl. Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 33 (Ditko's letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an initial sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr.

Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived in Johnstown, PA at the address written on the letter envelope of composite Ex. 33, and that in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

73. **Lee acknowledged that Ditko was the originator of the character, which flowed from concepts Ditko had been playing with for years.** See Toberoff Decl. Ex. 1 at 121 (Evanier Rep. providing historical context of Lee's admission that Ditko originated the idea and story for the Dr. Strange character); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange "twas [Ditko's] idea," in a contemporaneous letter dated January 9, 1963).

74. **Ditko's early Dr. Strange sketches depict what would later become the character he created and sold to Magazine Management.** See Toberoff Decl. Ex. 33 (Ditko's letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 49 at 1 (first published appearance of Dr. Strange in *Strange Tales* No. 110); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

75. **Ditko plotted and drew completely "on spec" a five-page story introducing Dr. Strange, which he presented to Lee, which Magazine Management bought, and which was purportedly "published" by Vista.** See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing

historical context of the first publication of Ditko's Dr. Strange character which began as a five-page story Ditko wrote and drew on spec introducing the character which he presented to Lee); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); *id.* at DITKO-0307 (Ditko explaining that Dr. Strange was a unique character who was a contradiction to Marvel's other superheroes and that the story started out as a five-page filler story); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea,” in a contemporaneous letter dated January 9, 1963 and noting the story was a “5-page filler”); Ex. 42 (Certificate of Renewal Registration of *Strange Tales* Vol. 1, No. 110, the issue in which Dr. Strange first appeared, dated December 27, 1991, claiming “Vista Publications, Inc.” as the original author and copyright claimant); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a “5-page filler,” which was a great opportunity to try out all kinds of ideas like Dr. Strange, which “never fit in to Marvel’s world of heroes”); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko’s early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

of the time but Lee liked it and bought it and many more tales of Ditko's Dr. Strange followed. See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Dr. Strange as a character very different than any other character Marvel was publishing at the time); Ex. 25 at DITKO-0307 (Ditko explaining that Dr. Strange was a unique character who was a contradiction to Marvel's other superheroes); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “twas Steve[] [Ditko's] idea,” in a letter dated January 9, 1963); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a “5-page filler,” which was a great opportunity to try out all kinds of ideas like Dr. Strange, which “never fit in to Marvel's world of heroes”).

77. Ditko was selling work to other publishers, including Charlton Comics, at the same time as selling to Marvel. See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. describing Ditko's common practice of selling freelance work to various publishers during the Period); Ex. 12 ¶ 18 (Evanier attesting that Ditko was submitting freelance *Spider-Man* material to Marvel but was also selling work to Charlton Comics at the same time); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics).

78. Ditko thereafter created a host of supporting characters and an entire mythology of Dr. Strange before he stopped selling his works to Magazine Management in 1966. See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Dr. Strange and Ditko's role in creating numerous supporting characters before he stopped selling work to Marvel in 1966); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 26 at 83 (Lee writing concerning Dr. Strange, “Steve Ditko is one of the best plot men in the biz. When it comes to dreaming up story ideas, putting them together intricately, panel by panel, and utilizing the best of cinematic

techniques, the guy's a whiz. Thus, the spectacular saga that is about to knock you out was basically concocted by our own Mr. D[itko]"); *id.* (Lee writing concerning *Dr. Strange*, "After [Ditko] did the hard part—after he dreamed up the story and illustrated it in his own unique style—I then got to the fun part ... the dialog balloons and captions").

79. **In 1962, as Magazine Management cast about for new superhero ideas, Jack Kirby and Lee worked on a character named "Spider-Man," which Kirby said was based on an idea that he had developed with Joe Simon in the mid-1950s.** See Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and describing Kirby and Lee's initial work on a character named "Spider-Man" that was based on an idea developed by Joe Simon in the mid-1950s); Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko's version of the character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby's version of Spider-Man, he liked Ditko's); Ex. 29 at 33-34 (Ditko writing that the Spider-Man character that Lee and Kirby had originally worked up was a version of "The Fly" character created by Joe Simon).

80. **At some point, it was decided to toss their early development of a character by that name and start over in a brand-new direction.** See Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and describing the decision to go in a direction with the character different from Kirby and Lee's initial character based on the one developed by Joe Simon in the mid-1950s); Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko's version of the character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby's version of Spider-Man, he liked Ditko's); Ex. 29 at 34-35 (Ditko writing that the initial Kirby Spider-Man idea was tossed and Ditko created a brand new Spider-Man).

81. **Kirby insisted he was never paid for the pages he had drawn of that first**

version that was rejected by “Marvel.” See Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man’s creation and noting Kirby’s insistence that he was not paid for his initial work on Spider-Man).

82. **Ditko then devised a new costume, and a new direction was charted for a very different Spider-Man character.** See Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man’s creation and describing Ditko’s creation of a very different costume and direction for the character); Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko’s version of the Spider-Man character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby’s version of Spider-Man, he liked Ditko’s); Ex. 28 (Lee writing that Ditko was the co-creator of Spider-Man); Ex. 29 at 34-35 (Ditko writing that the initial Kirby Spider-Man idea was tossed and Ditko created a brand new Spider-Man).

83. **Ditko’s conception of the character and Kirby’s of Spider-Man were very different.** See Toberoff Decl. Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko’s version of the character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby’s version of Spider-Man, he liked Ditko’s); Ex. 29 at 34 (Ditko comparison depiction of Kirby’s and Ditko’s versions of the Spider-Man character).

84. **Ditko wrote on several occasions that the character and stories were all worked out without Lee ever writing an actual script.** See Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man’s creation and describing Ditko’s insistence that the character was worked out with Lee ever writing a script); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the story plotting of *Spider-Man* and just left Lee to do the dialogue and captions).

85. **That first *Spider-Man* story introduced not only Peter Parker (aka Spider-Man) but also his Aunt May and a rival at school, Flash Thompson—the first two members of what would eventually grow into a large supporting cast of friends and foes.** See Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and identifying the characters introduced in the first several dozen issues of the *Spider-Man* story done by Ditko); Ex. 60 (*Amazing Fantasy* No. 15 introducing Spider-Man, Aunt May, and Flash Thompson).

86. **Lee admitted that Goodman did not think the new character would sell and thus forbade Lee to continue with it.** See Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and explaining Goodman's dislike of the character); Ex. 4 at 75:24-78:2, 130:21-134:6 (Lee testifying that Goodman hated the idea of Spider-Man, but Lee published the story anyway); Ex. 17 at 307:12-310:9 (Thomas testifying that Goodman hated the idea of *Spider-Man*, but Lee published it anyway); Ex. 56 at 89:8-90:11 (Lee testifying that Goodman hated the idea of the Spider-Man character but Lee published the story anyway, without Goodman's permission).

87. **Lee, enthusiastic about Ditko's Spider-Man, flouted Goodman's authority and published the story in *Amazing Fantasy* No. 15, anyway.** See Toberoff Decl. Ex. 4 at 75:24-78:2, 130:21-134:6 (Lee testifying that Goodman hated the idea of Spider-Man, but Lee published the story anyway); Ex. 17 at 307:12-310:9 (Thomas testifying that Goodman hated the idea of *Spider-Man*, but Lee published it anyway); Ex. 56 at 89:8-90:11 (Lee testifying that Goodman hated the idea of the Spider-Man character but Lee published the story anyway, without Goodman's permission).

88. **Months later, after its success became known, Spider-Man got its own title and an *Amazing Spider-Man* comic was launched.** See Toberoff Decl. Ex. 1 at 21 (Evanier Rep.

providing historical context of Spider-Man's creation and explaining that after initial sales figures came in for the first *Spider-Man* story showing it was a success, Spider-Man got its own series); Ex. 56 at 89:8-90:11 (Lee testifying that *Spider-Man* got its own series after the first story was a success).

89. **In short order, the cast swelled with supporting characters in the life of Peter Parker like J. Jonah Jameson and Mary Jane Watson, and Spider-Man foes like Dr. Octopus, The Sandman, The Green Goblin, Kraven the Hunter, The Vulture, The Scorpion and many, many more.** See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Spider-Man's creation and identifying the characters introduced in the first several dozen issues of the *Spider-Man* story done by Ditko).

90. **All these and many others were co-created by Ditko, and firmly established well before Ditko left the comic, and stopped selling work to “Marvel” in 1966.** See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Spider-Man's creation and identifying the characters introduced in the first several dozen issues of the *Spider-Man* story done by Ditko); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* stories while Ditko and Lee were not speaking); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the “Marvel Method,” and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and captions).

91. **Counterclaimant’s Notices of Terminations concerning the Works were duly served on Marvel and its affiliates and recorded with the U.S. Copyright Office.** See Toberoff Decl. Ex. 66 (Certificates and proof of recordation of Counterclaimant’s Notices of Terminations).

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By: /s/ Marc Toberoff
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